No. 15402

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Richard William Bowler, *Appellant,*

vs.

United States of America, *Appellee*

BRIEF FOR APPELLEE

Appeal from a Judgment of the United States District Court for the Eastern District of Washington, Northern Division

William B. Bantz,
United States Attorney.

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Assistant U. S. Attorney.

SHAW & BORDEN CO. 319704

INDEX

INDEX (Continued)

CITATIONS

CITATIONS (Continued)

STATUTES INVOLVED

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JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

STATUTE INVOLVED

15 U.S. Code, Section 77q:

"*Fraudulent interstate transactions* (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the mails, to publish, give publicity to or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section. May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84."

ADDITIONAL STATEMENT OF FACTS

In order that the questions involved may be better pointed out, an additional statement of the case will be summarized.

ADDITIONAL STATEMENT OF CASE

Defendant, Richard William Bowler, was convicted on two counts of violating Section 17(a) of the Securities Act of 1933 (Sec. 77q(a) Title 15, U.S.C.). He was charged with devising a scheme to defraud purchasers of the common stock of Spokane Warehouse & Storage Co. by selling this stock by misrepresentations and by concealment of material facts. Defendant was charged with employing this scheme to defraud in the sale of securities and using the mails in so doing.

It was charged that defendant's scheme to defraud embodied the following misrepresentations:

That Spokane Warehouse & Storage Co. was in sound financial condition and operating at a profit; that dividends had been paid on its common stock; that based on successful operation and profits dividends would be paid; that the stock had a market value in excess of ten cents a share (the selling price) and this market value would soon increase substantially; that the stock would soon be listed on

a stock exchange and traded at a price substantially over the existing selling price; that a purchaser could get his money back from defendant; that the stock was company stock and the proceeds from stock sales would go to the corporation and be used for improvements to increase earnings; and that there was only a limited amount of stock for sale.

The material omissions charged were that defendant concealed from purchasers the following facts:

That there existed $350,000 in outstanding first mortgage 6% bonds; that the corporation was in default on interest payments due on these bonds; that the corporation had never operated at a profit but during each year of its operation had accumulated earned surplus deficits amounting to over $100,000 by September 30, 1954; that no dividends on the stock could be paid until this deficit was eliminated; and that defendant was selling his personally-owned stock for his own benefit and not stock for the benefit of the company.

Defendant Bowler was one of the original promoters of Spokane Warehouse & Storage Co., which operates a parking garage and a storage warehouse in Spokane, Washington. (R. 686-693) Bowler had financed the corporation by selling $350,000 in 6% First Mortgage bonds between December 1950 and July 31, 1953. (R. 211, 234) For his promotional ser-

vices and for assigning a lease on the land and a purchase contract on the building he had received 1,180,000 shares of the corporation's common stock having a par value of ten cents a share. (R. 209) Bowler gave over 300,000 shares to his associate promoters and others (R. 832-841) and donated 380,000 shares to the corporation for distribution as a bonus to the bond purchasers. (R. 208—P. Ex. 34A) This left Bowler, holding 447,000 shares (R. 842), the corporation's largest stockholder. (R. 842).

This case involves the sale of the common stock held by Bowler. In September 1953, when the corporation was confronted with the serious problem of how to meet its bond interest due December 31, 1953, Bowler offered to take an option to purchase 118,850 shares of stock to net the corporation 7½c per share. (R. 229, 544, Ex. 34B) In the fall of 1953 Bowler began to sell his personally owned stock at 10c a share and in January 1954 gave the company $8,850 to pay for 118,000 shares at 7½c a share, this amount of stock being then issued to Bowler. (R. 229-231) This $8,850 was used by the corporation in making a partial bond interest payment of 3%. (R. 310).

Although after January 12, 1954 the company received no more money for stock, (R. 234) Bowler continued to sell his own personal stock for his own profit. By January 1955 he had disposed of a total of

469,000 shares, nearly all at 10c a share. (R. 836) The jury's verdict sustained the charge that he employed a scheme to defraud in selling this stock by means of misrepresentations and by concealing material facts chiefly relating to the poor financial condition of this corporation.

In the light of Bowler's sales talks, the results of operations of this corporation both before and during the period of Bowler's stock sales are important. Bowler had acted as manager for the corporation during the first period of operations, but discontinued this activity early in 1953. (R. 577) The company never operated at a profit and an earned surplus deficit of $52,970.55 on September 30, 1952, had increased to $108,399.41 by September 30, 1955 (R. 222), of which $24,439 was delinquent bond interest due as of December 31, 1954. (R. 226) This continued operational loss was well known to Bowler as a promoter, as a manager during a part of the period, and as a stockholder receiving financial statements prepared by the corporation's accountants. (R. 218, 847-849, 851) In addition, during the period Bowler was selling his stock he frequently obtained current financial information from the corporation's accountants, records, and officers. (R. 228-233, R. 218, 847-849, 851, 870) At all times his office was in the corporation's warehouse building adjacent to the parking garage. (R. 116).

THE EVIDENCE

Thirteen investor witnesses testified at the trial for the Government and, although their testimony indicated that Bowler varied his sales talk somewhat, the same basic misrepresentations in one form or another were made to all of these investors. However, in spite of the fact that witness after witness testified as to these specific misrepresentations which are now being discussed, Bowler denied making any of the misrepresentations, and in this respect there exists a direct conflict between the testimony of appellant Bowler and the testimony of these investors, most of whom were farmers residing in various sections of eastern Washington. The verdict of the jury has, of course, resolved that conflict against Bowler.

A. *Representations Regarding the Financial Conditionof the Company and Dividends*

John D. Schoedel, a Certified Public Accountant, who has been secretary and treasurer of the corporation since December 31, 1954 (R. 193-195) and a partner in the accounting firm of Schoedel and Elder, which does bookkeeping and accounting work for the corporation, testified concerning the corporation's financial condition. Exhibits 39 and 40 contain detailed figures of the corporation's operations from its inception until the end of February 1956, about two months before the trial of this case. These include

periodic profit and loss statements and balance sheets. An examination of these records discloses that at no time has this corporation operated at a profit.

The losses were as follows for each year ending on September 30: (R. 220-221)

1952—$52,970.55

1953— 37,741.03

1954— 14,361.20

1955— 8,234.30

As heretofore pointed out, the earned surplus deficit increased each year: (R. 222)

1952—$ 52,970.00

1953— 85,794.91

1954— 100,156.11

1955— 108,399.41

During these years the company had outstanding $350,000 in first mortgage bonds due December 31, 1960, bearing six per cent interest which amounted to a yearly obligation of $21,000.00. (R. 223) The corporation paid only three per cent interest in 1953 and two per cent in 1954, so that the amount of bond interest due and unpaid amounted to $20,510.00 at

the end of 1953 and $24,439.00 at the end of 1954 and 1955. (R. 226-227) In this situation the corporation was, of course, never in a position to pay dividends and Schoedel so testified. (R. 226) Section 4 of Article V of the bond indenture agreement (Ex. 38 page 12; R. 225-226) contained the following prohibition against the corporation paying a dividend:

> "That it will not declare or pay any dividend on any class of its stock . . . except out of net earnings of the Company properly available for the payment of dividends and further, that it will not declare or pay any such dividends if such payment will in any manner interfere with the conduct of the business operations of the Company."

In addition, the laws of the State of Washington govern payment of dividends, Section 23.24.020 Revised Code of Washington providing: "Every corporation shall carry the amount of its capital stock upon its books as liability . . . In computing the aggregate of the assets of the corporation, the Board of Directors shall determine and make proper allowance for depreciation and depletion sustained and losses of every character . . ." and Section 23.24.030 Revised Code of Washington providing: "No corporation shall pay dividends: (1) in cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter, the amount of its capital stock." (See Instruction R. 1004).

That Bowler knew of the serious financial condition of this company on September 2, 1953, about the time he began to sell his stock, is disclosed by the minutes of a directors' meeting attended by Bowler (Ex. 34B, R. 544).

A portion of these minutes reads as follows:

> ". . . The affairs of the company were discussed at length and Mr. Stout presented his report on the prospects of increasing the volume of business now being done. The loss of the ten-month period ending July 31, 1953 amounted (sic) to $35,593.90 contained provisions for bond interest of $16,087. and depreciation charge of $12,000., or a total of $28,087.00. The loss for the ten months without these charges would have amounted to $7,506.90, or an average of $750.69 per month. Bond interest in the amount of $21,000 would be due December 31, 1953 and the company is confronted with the serious problem of how to meet this obligation.
>
> "Mr. Stout reported that the balance of the sprinkler system works and running a new water main to the property will cost a balance of about $4500. *Mr. Bowler proposed to buy* 60,000 *shares of common stock to net the company* 7½c *per share to raise the* $4500. *necessary. He also proposed to buy the remaining* 58,850 *shares of stock at a later date to help towards financing the bond interest due December* 31. Accordingly, it was unanimously agreed to give Mr. Bowler option to purchase 60,000 shares of common stock at 7½c, said option to run until September 30 and another option to purchase the remaining 58,850 shares at 7½c, this option to run until December 31, 1953." (Italics supplied).

With this unfortunate financial condition of the company in mind, an examination of the testimony concerning Bowler's representations clearly reveals the fraudulent pattern of his sales.

In September 1953 Bowler sold stock to Lala Dixon, a school teacher. Miss Dixon testified:

> "He (Bowler) told me that it would pay ten per cent dividends . . . but not in 1953 because that was too late, but in 1954" (R. 22). "I asked if it were really good, because ten per cent sounded like quite a bit of income, and he said yes, it was good." "What I remember distinctly was that it was a good company and that the dividend would be paid." (R. 23).

In November 1953 Bowler sold stock to Frank Swannack, Jr., a farmer. Swannack testified concerning Bowler's representations regarding the company's financial condition:

> "On the first meeting he (Bowler) indicated that the stock should pay a dividend of one cent a share some time after the first year . . . He indicated that the company was in good financial condition . . ." (R. 354).

J. P. Helme, a farmer, who purchased stock from Bowler in December 1953, testified that Bowler told him that this corporation was a good business and a going concern; that he only had eight thousand shares left to sell; that the stock would be put on the Spokane Stock Exchange for from thirteen to fifteen

cents a share after the first of the year 1954 and then would pay one cent a share; that four or five years after it had been put on the Stock Exchange it would increase in value until the stock would yield ten cents a share; that the company was selling this stock to secure money to convert storage space into parking facilities (R. 522, 523, 524, 531, 532).

In February 1954, Bowler sold stock to Henry J. Franz, a farmer. Franz testified that Bowler told him that the stock of the Spokane Warehouse and Storage Company was stock of a growing concern and that the chances for it becoming a big thing were very good and that a dividend of one cent a share was to be paid October 1, 1954 (R. 67, 71, 91).

In March 1954, Arthur Schorzman, a farmer, purchased stock from Bowler. Schorzman testified that Bowler represented that this stock:

> "was definitely paying six per cent and it was a very good investment, that it was bound to keep on paying six per cent, and that the company was still having some indebtedness and when that is paid off they would pay ten per cent" (R. 614, 615, 629, 651).

In making a sale of stock to Archie Zickler, a farmer, in the spring of 1954, Bowler represented that this stock would show a good return. Zickler testified:

> "He (Bowler) showed me a typewritten balance sheet, I believe you would say. The figures on that sheet showed a good earning for the preceeding period, I believe, and as of September '53 and the figures, the net profit on that sheet, would indicate that the company could easily pay ten per cent dividends on the stock outstanding" (R. 312).

Zickler recalled that this financial sheet "merely listed the operating expenses and income for, I believe, a twelve-month period" (R. 313). "There were no figures showing any operating losses or outstanding bonds or bond interest due" (R. 314, 315).

In March 1954, Bowler made the following representations to William Sutherland, a farmer, who purchased stock from Bowler:

> "He said it was good stock, it was paying good dividends. He said it was paying one cent a share or ten per cent. I believe he said that it had paid that this last year. I believe he said that it was paying that now at this time. He said it would be a good investment" (R. 453, 454).

In selling stock to William G. Wahl, a farmer, in April 1954, Bowler stated, according to Wahl's testimony, "that it was a good investment and a paying proposition and if I would make some investment it would probably pay us part dividends or something that first fall, you know, '54. He didn't mention any specific amount of dividends but that it would pay" (R. 100, 101).

To Oscar Wagner, a farmer who purchased stock from Bowler in May 1954, Bowler varied somewhat his ordinary pattern. Wagner testified that Bowler told him that he had stock to sell for the Spokane Warehouse Company and that it was attractive stock. Bowler said the company had been operating at a loss through mismanagement but that it would be reorganized under new management and that the stock should pay seven per cent dividends and be put on the stock exchange or the Board of Trade and should double in price that summer. Bowler said he had a consignment to sell the entire stock of the company, the money to be used in reorganization of the company (R. 175 through 179).

M. J. Hyde, a farmer, purchased stock from Bowler in September 1954. Hyde testified that Bowler exhibited a statement showing that the corporation's business was operating at a profit (R. 156); that Bowler said he believed the stock would eventually show a dividend, probably within several years, that there should be good capital gains on the stock, the book value of the stock would increase (R. 160, 161), and that the stock would be put on the local Spokane Stock Exchange (R. 170).

Carl N. Heathman, a farmer, testified that when he purchased stock from Bowler in November 1954, Bowler told him that the Spokane Warehouse and Storage Company had an exceptionally good business

and very good income; that it was a prosperous business and an exceptional investment; that the by-laws of the company would allow only five per cent stock dividends but that right after the first of the year the stock would be on the Spokane Stock Exchange and since they were making so much more money than this five per cent dividends the stock would rise very rapidly on the stock exchange (R. 486, 487). Heathman further testified: "We bought the stock with the understanding that there was no bonds issued at all and that the building was practically paid for and that we were going to get dividends of five per cent immediately" (R. 512).

Loren P. Griffith, a farmer, who purchased stock in December 1954, testified that Bowler told him that this was a very good company; that Bowler read a financial statement of the company which indicated that the company was in pretty good financial condition and that in time would pay dividends. Bowler said that there was a mortgage against the company and that he was selling stock to retire the mortgage and when the mortgage was retired then the company would be able to pay dividends. This mortgage would be retired as soon as all the stock could be issued. Griffith testified that Bowler did not mention that there was three hundred fifty thousand dollars worth of outstanding bonds or that there was delinquent interest due on these bonds (R. 332 through 335).

Dan R. Anderson, a farmer, testified that in selling stock to him in December 1954, Bowler said that the company was paying five per cent on the stock, the original investment, each September; that they had paid five per cent dividends in the past and Anderson could expect five per cent in the future. Anderson also testified that Bowler said the company could have paid as high as ten per cent but the other five per cent was retained in the business, and that the finances of the company were "in good solid, sound condition" (R. 111, 112, 135-C).

Howard Underwood, a farmer, testified that when Bowler sold stock to him in January of 1955 Bowler stated that although the company was not in too good a financial position because they had installed a sprinkler system at a cost of $17,000, at the rate the company was doing business Underwood would receive six per cent on his investment within two years, and that if Underwood ever needed the money to purchase land, or anything else, Bowler would buy the stock back from him at the price Underwood had paid (R. 442, 443).

Most of the witnesses testified positively that Bowler did not mention the outstanding bonds or delinquent interest. (Schorzman R. 630; Zeckler R. 315; Underwood R. 442; Griffith R. 334, 335; Helme R. 526; Heathman R. 490; Anderson R. 114; and Franz R. 98). Bowler admitted that he knew that

no money was being set aside by the company to pay these bonds which would become due in 1960. (R. 871).

B. *Representations Regarding Market Price and Listing of Stock on the Stock Exchange*

Until Bowler began selling his promotion stock to the public about September 1953, there had been no public distribution of this corporation stock except that given as a bonus to bond purchasers (R. 262). There had been no trading in the stock and no market for this stock existed. This fact was established by the testimony of Ben Harrison, Spokane stock broker and President of the Spokane Stock Exchange. He testified that no application for the listing of the stock of the Spokane Warehouse and Storage Company on the Spokane Stock Exchange had ever been filed and that this stock had never been traded among the brokers in the Spokane market (R. 431). Even Bowler had to admit there was no market and no trading (R. 912-913). In spite of this fact Bowler continually made misrepresentations concerning the existence of a market for this stock and relating to the listing of this stock on the Spokane Stock Exchange. These misrepresentations were always coupled with additional misrepresentations as to the expected increase in the market value of the stock. The purpose of these misrepresentations, of course, was to lead the investors to believe that they were buying a stock which could be readily disposed of at a

profit. The misrepresentations regarding the listing of the stock were always coupled with a representation that the stock would be listed at a price above the 10c figure at which Bowler was selling the stock.

Bowler told Helme in December, 1953, that the stock would be put on the Spokane Stock Exchange at from 13c to 15c a share after the first of the year, 1954 (R. 523, 524). Sutherland was told in March, 1954, that the stock would be listed on the Stock Exchange on June 1, 1954 at 15c a share (R. 455, 456). In December, 1953, Bowler advised Swannack that the stock would be placed on the Spokane Stock Exchange at a starting price of 12c to 14c a share after the first of the year (R. 354, 356, 404, 405). The witness Anderson testified that Bowler told him in December, 1954, that he would get this stock on the board in a month or two and that it would sell at not less than 12c a share (R. 113, 114). Bowler also told Anderson that although the stock was selling for 10c its valuation was 18c because of the condition of the company (R. 118, 119). Although Anderson first testified that Bowler had referred to the New York Stock Exchange, as emphasized in appellant's brief, he corrected this statement saying that Bowler was referring to one of the small stock exchanges around Spokane (R. 138, 139).

Other witnesses who testified that Bowler told them that the stock was soon to be listed on a stock ex-

change are Hyde (R. 170), Zickler (R. 313), Griffith (R. 344). Heathman, who bought his stock in November, 1954, was told that right after the first of the year the stock would be listed on the Spokane Stock Exchange and because the company was making so much more money than the 5% dividends which were allowed to be paid by the company by-laws, the stock would rise very rapidly on the stock exchange (R. 487). The witness Schorzman was also told by Bowler that the stock was going to be put on the Spokane Stock Exchange in the matter of a few weeks after March 1954 (R. 620).

Two of Schorzman's exhibits which were letters received from Bowler, referred to a market in this stock. Exhibit 88 is a letter Schorzman received from Bowler, written on Bowler's stationery, dated March 29, 1954, after Bowler had made an oral promise to sell Schorzman's stock without cost at any time within a year (R. 622). In this letter Bowler stated:

> "In regard to your Spokane Warehouse and Storage Company common capital stock. *I feel that the market will remain strong* for some time and so if you are desirous of selling this stock at any time within this year I shall be happy to offer your stock on the *open market* at a price to net you not less than 10c per share." (Italics supplied).

Exhibit 94 is a letter from Bowler to Schorzman dated September 11, 1954, containing this statement:

> "I will take care of part of the other stock for you if you wish but do suggest that you wait for another two or three weeks as I feel that the *market will be more advantageous* at that time due to the continued bus strike and the effect that it will have on this stock." (Italics supplied).

Exhibit 69 is a letter Bowler gave to the witness Sutherland which is dated March 29, 1954, and is identical with Schorzman's Exhibit 88, referring to the fact "that the market will remain strong for some time." Bowler's explanation was that he meant "the market that I had for it, the places I had to sell it. No one else that I knew of was selling it" (R. 940).

A second sale of stock was made to Swannack in August, 1954, and Swannack, in answer to a question as to why Bowler was then offering stock to him at 9c a share testified:

> "Mr. Bowler said he would sell the stock at a discount. He said it was worth 11½c at that time but because of his position he could not sell it on the open market so that therefore he was offering it at a discount" (R. 364, 410).

Bowler flatly denied that he had represented the stock would be listed on the exchange (R. 904, 913).

C. *Proceeds from Sale of Stock Going to Corporation*

From September 1, 1953, until the early part of 1955, Bowler sold some 469,000 shares of personal

stock, nearly all of it at 10c a share (R. 921). Pursuant to his proposal made to the corporation, as evidenced by the minutes of September 2, 1953 (Ex. 34B), which gave Bowler an option to purchase 118,850 shares from the corporation at 7½c per share, Bowler on January 12, 1954, paid the corporation \$8,850 for 118,000 shares of stock (R. 891). Bowler admitted that this was the only money received by the corporation from the sale of any of the stock that Bowler was offering (R. 927). This was used by the company pursuant to the minutes of the Directors' meeting on December 16, 1953 (Ex. 34C), to help make a partial payment of the bond interest due at the end of 1953. At that time a 3% interest payment amounting to \$10,500 was paid out to bondholders. Since Bowler was the only person who was engaged in selling his personally owned stock to the public, he was perhaps more interested than anyone else in seeing that some interest payment was made to the bondholders so as to avoid any possibility of a mortgage foreclosure which would, of course, have the effect of wiping out the common stock. In fact, Bowler admitted that one of the reasons he bought the stock was because he felt the company could then pay the full bond interest and "it would enhance the company and be of benefit to the company" (R. 886).

Regardless of the fact that Bowler was selling his own personal stock and, with the exception just noted,

putting all of the proceeds from these sales of stock into his own pocket, Bowler continuously represented that he was selling stock for the corporation and that the proceeds were to be used by the corporation for corporate purposes. In February, 1954, Bowler told Franz that the proceeds from stock sales were to be used by the company to repair facilities and increase the company's revenue. Bowler mentioned that one of these repairs was to be on a roof that leaked, causing cars to get dirty in the wintertime (R. 67, 70). In September, 1954, Bowler told Wahl that stock was being sold to raise money to improve the parking facilities so that the company could park more cars (R. 102). Swannack was also told by Bowler that the company was selling stock to pay for recent remodeling for parking facilities (R. 357). Griffith testified that Bowler said he was selling the company stock in order to retire a mortgage (R. 333, 334, 335, 336). Helme was told by Bowler that the proceeds were to be used by the corporation to convert storage space into parking facilities (R. 524). Both Zickler (R. 312) and Sutherland (R. 455) were told that the company needed money for expansion and to improve parking facilities. Schorzman (R. 614), Anderson (R. 111, 135D), and Wagner (R. 176) were told by Bowler that he was selling stock for the benefit of the company.

In connection with these representations as to the use of the proceeds by the corporation, Bowler sometimes used another misrepresentation apparently to encourage prospective investors to arrive at an immediate decision. He told them that the stock he was offering was the last of the stock to be sold by the company. This representation was made to Helme in December, 1953 (R. 523), to Wahl in September, 1954 (last opportunity to buy at the price of 10c a share) (R. 103), to Schorzman in March, 1954 (last stock that was to be sold and Bowler wanted to get rid of it so he could go on another job somewhere down on the coast) (R. 614), and to Anderson in December, 1954 (last stock Bowler had to sell and if Anderson took it all Bowler would knock off his commission of 5%) (R. 117). Bowler denied making any of these representations (R. 925-940).

D. *Representations Concerning Agreements to Repurchase Stock*

Another device used by Bowler in his scheme to induce persons to purchase the stock of Spokane Warehouse and Storage Company was to represent that he stood willing to repurchase the stock. Howard Underwood, a farmer who purchased stock in January 1955, testified that Bowler told him:

> "That if I ever needed the money to purchase land with or anything like that, that he would buy the stock back from me at what I paid for it" (R. 443).

Sutherland also wanted an agreement from Bowler that he could get his money out of the stock in the event he needed it to build grain storage. Bowler told him he would buy the stock back within a year if Sutherland desired to sell (R. 457). Thereupon Sutherland and his wife wrote up an agreement in which Bowler would agree to buy back the stock within a year and pay at least ten cents a share (R. 460). Bowler said this agreement was not written up properly, so he prepared and sent Sutherland a letter (Ex. 69) dated March 29, 1954, which contained Bowler's promise to offer Sutherland's stock on the open market any time within a year to net Sutherland not less than ten cents per share (R. 461). In March 1955, Sutherland wrote to Bowler asking him if he would buy the stock back or try to sell it for him, but Bowler did not reply (R. 462, 463, 465).

Another written repurchase agreement was given by Bowler to Swannack. Bowler had persuaded Swannack to purchase stock at 9 cents a share by representing it was then worth 11½ cents but that Bowler, because of his position, could not sell it on the open market (R. 364). Swannack tried to cancel the transaction that evening, as Bowler had agreed, by calling Bowler in Spokane (R. 360). Bowler met Swannack the next morning and agreed to send Swannack's check back (R. 364). Instead Bowler wrote (Ex. 52, R. 366):

"Dear Frank:

"By the time I had gotten back to the office, the girl had taken all of my checks to the bank for deposit. As soon as it comes back, I will shoot it right down to you.

"Sorry.

Bill."

Bowler then mailed the stock certificates to Swannack, and on September 17, 1954, (Ex. 53), and again on September 25, 1954 (Ex. 54), wrote Swannack promising to resell this stock for Swannack (R. 368, 371). After attempting to see Bowler for several months Swannack met him at Bowler's home on January 8, 1955, and Bowler prepared an order for Swannack to sign so that Bowler could sell Swannack's stock (R. 373, 374). Swannack finally succeeded in getting a promise from Bowler that Bowler himself would buy these shares back, but of course this promise was never fulfilled (R. 275). Bowler admitted that he had made a sale of 10,000 shares of his own stock to Underwood only two days after January 8, 1955, when he agreed to resell Swannack's stock (R. 918).

A somewhat different use of the possibility of repurchase was employed by Bowler in his sales to Schorzman. Bowler represented to Schorzman that he would sell him stock only if the latter would agree

to give him an option to repurchase it. Bowler had originally sold stock to Schorzman, agreeing that if Schorzman should wish to resell the stock Bowler would sell it for him at no charge and sent him a letter similar to that he had sent Sutherland (R. 623, 625, Ex. 88). Schorzman next saw Bowler in September 1954, when Bowler called at the ranch. Schorzman advised Bowler that he and his brother had decided to sell the stock as agreed, but Bowler said that would be foolish as the stock would have a substantial increase in value because of a bus strike in Spokane (R. 627). Schorzman then testified that Bowler said he had come to sell the Schorzmans more stock, "that he was wanting to buy 60 acres out in the Spokane Valley for years from a lady from California who was now ready to sell to settle an estate and he was \$2250 short of making a purchase. She wanted \$10,000 and that he would sell 25,000 shares to us for \$2250 but that he would only sell them to us if we would sign an agreement that we would sell it back to him about January the 1st, 1955 and that he would give us \$500 for the transaction plus the dividend that we would receive in December from the company." Bowler had told the Schorzmans that he "had sat in a few days before on a meeting and the company was definitely paying 6% dividend on the stock, and if the bus strike would last that business would be so improved in the next two or three months they could possibly pay more than 6%" (R. 628, 629).

Schorzman made the deal, and Bowler thereupon wrote out an agrement (Ex. 93) which he and Schorzman signed (R. 632). This agreement, dated September 9, 1954, read as follows:

> "The undersigned does hereby agree to sell back to R. W. Bowler 25,000 shares of Spokane Warehouse & Storage Co. Common Capital Stock for a net price of $2750 including dividend on or before Jan. 15, 1955."

The next morning after making this deal Schorzman decided a mistake had been made and decided to cancel the deal. Bowler did not cancel the transaction but wrote Schorzman as follows in a letter dated September 11, 1954 (R. 635, Ex. 94):

> "I received your note this morning when I came down as I had not been in since Wednesday afternoon after seeing you. I had been completing my other affairs that I spoke to you about when I was down there.
>
> "I understand your situation completely but I did feel that between you and Arnold could handle it between yourselves and on your own. In that it is too late to cancel that agreement I will take care of part of the other stock for you if you wish but do suggest that you wait for another two or three weeks as I feel that the market will be more advantageous at that time due to the continued bus strike and the effect that it will have on this stock. Let me know what your feelings are on this and I shall do my best by you."

Bowler repeatedly failed to repurchase or resell any of the stock he had sold Schorzman although Schorzman made many requests that he do so, and Bowler continued to make promises that he would (R. 639, 640, 642).

Bowler denied that he had told Schorzman he needed money to purchase land (R. 907 910). Bowler admitted that he didn't have $7,500 in the bank at that time (R. 908) and that in fact his bank account only a few days before was overdrawn by $489.98 as shown by Exhibit 103 (R. 907), so there was no truth to Bowler's representation that he was only $2250 short of making a $10,000 purchase of land from a lady from California.

All of this evidence conclusively proves Bowler's continued misrepresentations concerning his ability to either repurchase his customers' stock or resell it for them.

E. *Use of Mails in Counts I and III*

An essential element of the crime of which appellant was convicted was his use of the mails in connection with his sale of stock by fraudulent means. It is submitted that the mailing of the stock certificates to the investors named in Counts I and III of the Indictment (the two counts on which appellant was convicted) has been definitely established by

direct evidence. Anderson, the investor named in Count I, testified (R. 121) that he had received his stock certificate (Ex. 22) through the mails in the envelope identified as Exhibit 21. He testified the receipt given to him by Bowler (Ex. 20) was filled out and signed by Bowler (R. 120, 123). The printing of the name "Dan R. Anderson, Ritzville, Wash." on this receipt (Ex. 20) and the envelope (Ex. 21) is identical so the envelope was addresed by Bowler. In addition the enevelope (Ex. 21) contains the return address "R. W. Bowler, 125 S. Stevens, Spokane 8, Washington."

The situation is exactly the same as to the use of the mails in the Griffith transaction (Count III). Griffith (R. 341) received his stock certificate (Ex. 49) in an envelope bearing Bowler's return address (Ex. 48) which was addressed by Bowler in the same manner as the receipt (Ex. 47) Bowler issued to Griffith.

In addition May Bernard, an employee of the accounting firm of Schoedel and Elder testified that she made transfers from Bowler's stock certificates at his direction and delivered the new certificates back to Bowler (R. 482, 483). Bowler admitted that he mailed or authorized someone to mail those certificates that he did not deliver personally (R. 916). Bowler's use of the mails for delivering the stock

certificates as charged in Counts II and III could hardly be established with more certainty. Thus the existence of this essential element of a violation of Section 17(a) of the Securities Act of 1933 is clear. *U. S. v. Monjar* (D. C. Del.) 47F. Supp. 421; aff. 14 F. 2d 916, c.d. 325 U.S. 859.

F. *Other Evidence*

Other evidence in this case relates to Bowler's background, his character and reputation, his efforts to organize this corporation, to lease the properties, to purchase and remodel the buildings, to obtain permits and licenses and to sell the bonds. Much of appellant's brief is directed to a discussion of this evidence. It is the Government's contention that at this time such evidence is all relatively immaterial except as it has a bearing on Bowler's close association with the corporation and his admitted knowledge of its poor financial condition. Hence no time will be spent in discussing these background facts. The only issue here is whether Bowler sold his stock by fraudulent means.

QUESTIONS INVOLVED

Because of the nature of the evidence in this case, it is felt that two questions are presented for determination, to-wit:

1. Was there adequate evidence to prove appellant guilty beyond a reasonable doubt on Counts I and III of the indictment?

2. Was appellant's motion for judgment of acquittal properly denied by the trial court, and if so, should the reviewing court affirm the trial court's order?

SUMMARY OF ARGUMENT

The evidence in this case was direct. The acts, statements, and representations made by appellant in selling securities were proven by direct evidence, and appellant admitted knowledge of the material facts with which he was charged in concealing; and admitted making statements that were proven to be false. Both direct and circumstantial evidence was introduced as to the existence of particular elements of the crimes charged, to-wit: the existence of the scheme to defraud. The use of the mails was proven by direct evidence. Appellant's knowledge of the financial condition of the company was proven by direct evidence. The evidence, viewed in its entirety, was sufficient to prove appellant's guilt in Counts I and III of the indictment.

On a motion for judgment of acquittal the evidence should be considered in the light most favorable to the Government. The evidence of this case is such that it excludes every reasonable hypothesis but that of guilt and must be submitted to the jury. If reasonable minds, as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt, the question of fact is for the jury. The judgment of acquittal, then, was properly denied at each stage by the trial court. If, under this test, the case was properly submitted to the jury, its decision will be final.

This reviewing Court applies no special rule in reviewing circumstantial evidence on appeal. This circuit's rule is unlike the practice in other circuits. Evidence of a state of mind may be proven by evidence of surrounding circumstances, i. e. intent, knowledge. Great latitude is allowed in proving a fraudulent scheme. Evidence of transactions other than those directly related to Counts I and III of the crimes charged, are admissible to show the existence and nature of the scheme. Whether the evidence was inconsistent with every reasonable hypothesis of innocence of appellant was a question for the jury. The test on appeal urged by appellant respecting circumstantial evidence is not the rule with regard to this type of evidence in this circuit.

ARGUMENT

THE EVIDENCE OVERWHELMINGLY ESTABLISHES THE USE OF THE MAILS IN A SCHEME TO DEFRAUD IN THE SALE OF SECURITIES AND THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR ACQUITTAL.

Both of the questions felt to be involved will be answered under this heading.

It is manifest from the foregoing summary of the evidence that the government sustained its burden of supporting the charges in the indictment of which appellant was convicted, *i.e.*, that appellant knowingly and willfully sold securities by means of numerous misrepresentations and material omissions and that the mails were used in furtherance of this scheme to defraud. Appellant does not contend there was any error in the admission of evidence, in the charge to the jury, or in any other respect, except as to the denial of his motion for acquittal discussed below.

Viewing the evidence, as it must be viewed, in the light most favorable to the government, [1] it was clearly sufficient to send the case to the jury and to support the appellant's conviction. As stated by this Court in *Elwert v. U.S.*, 231 F. 2d 928, 933 (C.A. 9, 1956):

> "If . . . the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal." [2]

We have seen that appellant sold his stock in Spokane Warehouse and Storage Company by representing that the company was in sound financial condition and operating at a profit, having paid dividends in the past and expected to continue to do so, when, as a matter of fact, the company had never operated at a profit, had substantially increased its earned surplus deficit each year and was in default in interest on its outstanding $350,000 6% mortgage, the very existence of which appellant had concealed from some purchasers. We have seen, moreover, that appellant had lied about the market price of the stock and the likelihood of its being listed on an exchange, and had falsely represented that he would repurchase the stock if the purchasers should become dissatisfied. Finally, we have seen that he told investors that he

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[1] See *Glasser v. U. S.*, 315 U.S. 60, 80 (1942); *Schino v. U. S.*, 209 F. 2d 67, 72 (C.A. 9, 1954), and *Woodard Laboratories v. U. S.*, 198 F. 2d 995, 998 (C.A. 9, 1952).

[2] See also *McCoy v. U. S.*, 169 F. 2d 776, 783 (C.A. 9, 1948), *cert. denied*, 335 U.S. 898 (1948). *Cf., Suetter v. U. S.*, 140 F. 2d 103, 107 (C.A. 9, 1944).

was selling stock owned by the corporation, so that the proceeds of the sale would accrue to the company for its use in making improvements to increase earnings, when, as a matter of fact, he was selling his personally owned shares.

Appellant points to very little evidence in contradiction of the overwhelming evidence upon which the jury based its verdict and these contradictions consist for the most part of his own testimony denying the conversations to which others had testified. [3] That the securities sold were of a business which was in actual operation and had an increasing gross income, factors stressed by appellant (Br. pp. 12-13), cannot in any way palliate the numerous material misrepresentations and omissions which the jury found appellant made. Even assuming that appellant had an "honest belief that the enterprises would ultimately make money for the stockholders" this could not "excuse or justify" his false representations for the purpose of obtaining money for the enterprise. *Foshay v. U. S.*, 68 F. 2d 205, 210 (C.A. 8, 1933), *cert. denied* 291 U.S. 674.

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[3] These denials are not relevant on this appeal since the testimony must be viewed in the light most favorable to the government. See cases cited in footnote [1], *supra*.

Appellant urges that the conviction should be reversed primarily upon language in a district court decision in another jurisdiction, which opinion is contrary to holdings of this circuit and, we submit, is erroneous. In *U. S. v. Gasomiser Corp.,* 7 F.R.D. 712 (D. Del., 1947) upon which appellant relies, the district judge granted a motion for acquittal, holding that the evidence as to whether a scheme to defraud existed was necessarily circumstantial and in a case based on circumstantial evidence a motion for acquittal must be granted unless guilt is "the only reasonable hypothesis from such evidence" i.e., "if there is any other reasonable hypothesis, although admittedly guilty may also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal" 7 F.R.D. at 718.

The proper test to be applied on a motion for directed verdict was clearly enunciated by this Court in *Stoppelli v. U. S.*, 183 F. 2d 391, 393 (C.A. 9, 1950) wherein it was stated:

> "It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. *Curley v. U. S.,* 81 U.S. App. D.C.

> 229, 160 F. 2d 229, 230. In the cited case, Judge Prettyman pertinently observes: 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F. 2d at page 233."

The quoted language from the *Curley* case summarizes a careful analysis of Judge Prettyman, wherein he notes that it is *not* the law "that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict" nor is it the law that "if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal." *Curley v. U. S.,* 160 F. 2d 229, at 232. He continues (160 F. 2d 232-233):

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the

> matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts." [Footnote ommited.]

Similarly, in recent cases, this Court has reaffirmed its rule that so long as there is substantial evidence from which a reasonable man might infer a finding of guilt, it is error to direct a verdict of acquittal; that in situations where a finding of guilt depends on inferences to be drawn from the circumstances proved, the determinations whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. In *Charles v. U. S.*, 215 F. 2d 831 (C.A. 9, 1954), this Court stated:

> "It is true that some of the evidence was circumstantial. However, it could not and cannot be said, as a matter of law, that reasonable minds could not conclude that the evidence was inconsistent with every reasonable hypothesis of innocence. Therefore whether the evidence was inconsistent with every such hypothesis was a question for the jury and not for the District Court or this court to determine." 215 F. 2d at 833-834.

See also *Elwert v. U. S.*, 231 F. 2d 928, 933 (C.A. 9, 1956); *Penosi v. U. S.*, 206 F. 2d 529, 530 (C.A. 9, 1953); *Schino v. U. S.*, 209 F. 2d 67, 72 (C.A. 9, 1954); *Remmer v. U. S.*, 205 F. 2d 277, 287 (C.A. 9, 1953).

This Court has indicated, moreover, that circumstantial evidence requires no "different treatment" from "that to be accorded direct evidence," *McCoy v. U. S.,* 169 F. 2d 776, 784, and see the quotation from *Elwert v. U. S.,* 231 F. 2d 928, 933 set forth at p. 34-35 *supra.* Particularly with respect to the existence of a state of mind, which must in almost every case be inferred, it would make little sense to apply a different set of rules from that applicable where reliance is only on direct evidence. In the instant case the actions of the appellant, his intimate knowledge of the company and its finances, his misstatements to investors and his failure to advise them of relevant and important facts, taken together, constituted a pattern of conduct from which a jury could hardly fail to infer a scheme or artifice to defraud on the part of appellant [4]. As noted by this Court in *Remmer v. U. S.,* 205 F. 2d 277, 288 (1953), factors of this sort "are but part of a general pattern of conduct engaged in by appellant from which the jury could infer the requisite intent."

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[4] *Cf. Horman v. U. S.,* 116 Fed 350, 352 (C.A. 6, 1902) which notes that the term "scheme to defraud" in the mail fraud statute "is used to characterize the guilty purpose and wrongful intent with which the scheme or artifice has been formed by the accused." *Cf. Dittman v. U. S.*, 224 Fed. 819, 823-824 (C.A. 6, 1915).

Finally, we note that even in a charge to the jury, as distinguished from the determination by the judge on a motion for acquittal, the circumstantial evidence rule urged by appellant would be improper. In *Holland v. U. S.*, 348 U.S. 121, 139-140 (1954) the Supreme Court explicitly stated that a charge that a verdict of acquittal must be reached if the evidence does not exclude every reasonable hypothesis but that of guilt is "confusing and incorrect." [5]

[5] *Cf. Penosi v. U. S.*, 206 F. 2d 529, 530 (C.A. 9, 1953).

CONCLUSION

For the reasons set out above it is submitted that the Judgment of the District Court should be affirmed.

Respectfully submitted,

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